

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



# 76-1417

**United States  
Circuit Court of Appeals** *B*

FOR THE SECOND CIRCUIT

Docket No. 76-1417

UNITED STATES OF AMERICA,

*Appellee*

vs.

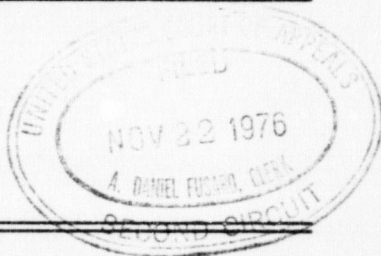
DANIEL VALERIANO,

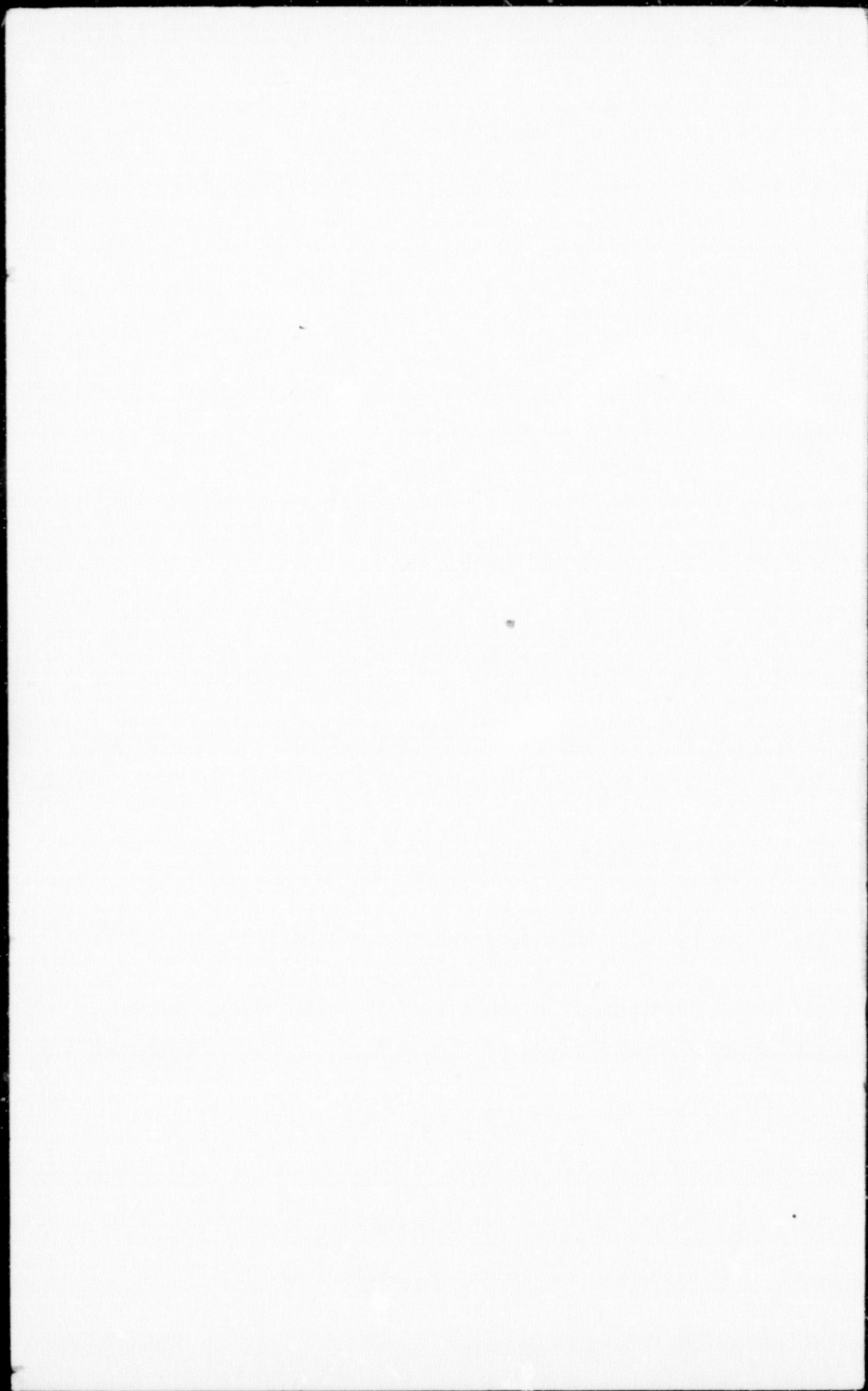
*Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

**APPELLANT'S BRIEF**

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18 U.S.C. Section 2518

**United States Circuit Court of Appeals  
FOR THE SECOND CIRCUIT**

Docket No. 76-1417

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UNITED STATES OF AMERICA,

*Appellee*

vs.

DANIEL VALERIANO,

*Appellant*

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**APPELLANT'S BRIEF**

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**Preliminary Statement**

This is an appeal from an unreported judgment of conviction under a two count indictment charging defendant with conducting an illegal gambling business in violation of 18 U.S.C. Sec. 1955 and conspiracy to violate Sec. 1955 (Sec. 371). The case was tried before Honorable Robert C. Zampano and a jury of twelve (12).

**Statement of Issues**

In a prosecution for violation of and conspiracy to violate, 18 U.S.C. Sec. 1955, where the substantive evidence against the defendant was obtained primarily as a result of wiretapping and the use of a dial number recorded (hereafter "pen register"):

1. Did the District Court err in denying defendant's motion to suppress all of the Government's evidence obtained as a result of electronic eavesdropping due to the failure of the Government to obtain judicial approval prior

to the installation of a pen register on the defendant's telephone line?

2. Did the District Court err in denying defendant's motion to suppress all of the Government's evidence obtained as a result of electronic eavesdropping due to the failure of the Government to serve defendant with a timely inventory pursuant to 18 U.S.C. Sec. 2518 (8) (d)?

3. Should all wiretap evidence against the defendant be suppressed because of the Government's failure to present such evidence to the judge issuing the wiretap order "immediately" upon the expiration of that order?

### Statement of the Case

#### I.

#### NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Defendant was indicted on two counts by a federal grand jury sitting at Hartford and charged with conducting an illegal gambling business in violation of 18 U.S.C. Sec. 1955 and with conspiring to commit the substantive offense. The crucial evidence against defendant resulted from Government wiretapping and use of a pen register on defendant's telephone line.

Prior to trial, defendant moved for suppression of the wiretap evidence on the ground that he had not been served a timely inventory, as required by 18 U.S.C. Sec. 2518 (8) (d). The Motion was denied by Judge Zampano. (App. ¶31).

During trial, defendant's counsel first became aware of the fact that, in addition to the court-sanctioned wiretap of defendant's telephone during January of 1973, the Government had also installed a pen register on his telephone line during the same period. The pen register on defend-

ant's telephone line was installed without the Government having made any prior application to the court for such installation. This motion was also denied by Judge Zampano. (App. 55; T. at 334.)

Defendant was convicted by the jury on both counts. On September 13, 1976 he was sentenced by Judge Zampano. On September 16 defendant filed his notice of appeal.

## II.

### STATEMENT OF FACTS

The issues raised on appeal center on the Government's conduct in three instances: (1) the installation of a pen register on defendant's telephone line; (2) service of inventory required by 18 U.S.C. Sec. 2518 (8) (d) on the defendant; and (3) presentation of wiretap evidence to the Judge who issued the wiretap order for sealing. The facts surrounding each instance will be discussed seriatim.

#### A. Installation of the Pen Register on Defendant's Telephone Line.

Neither the Government's application for an order authorizing interception of wire communication nor Judge Murphy's order authorizing such interception makes any reference to the installation of a pen register on the defendant's telephone line. (App. 11; 17.) Yet, at the time the wiretap was activated, a pen register was also installed on defendant's telephone line. (App. 42; T. at 320) When this fact became apparent to defendant's counsel for the first time, at trial, the Government admitted that Judge Murphy's authorizing order made no reference to a pen register. (App. 48; T. at 326.)

In sharp contrast to the procedure it followed in installing the pen register on defendant's line, the Government applied for and received an order authorizing use of a pen register against two other persons, one of whom was subse-



quently indicted as a co-defendant, on May 22, 1973. (App. 23, 25.)

Thus, the Government's installation of a pen register on defendant's telephone line during the period January 17-27, 1973 was done without the Government having made any prior showing of probable cause to a judicial authority.

B. Service of the Inventory Required by 18 U.S.C. Sec. 2518 (8) (d).

Judge Murphy's wiretap order authorized interception of defendant's telephone communications for a maximum period of 15 days from January 15, 1973. (App. 17.) Pursuant to 18 U.S.C. Sec. 2518 (8) (d), the Government was required to serve an inventory on the defendant within "a reasonable time but not later than ninety days" after the termination of the period of Judge Murphy's order. The ninety day period expired on April 30, 1973. On April 25, 1973, in Judge Murphy's absence, the Government sought and obtained from Judge Newman a so-called "extension" of the original order and the date of service of the inventory until May 25, 1973. On May 22, 1973, Judge Murphy granted a further "extension" of the original order and set July 16, 1973 as the final date for service of the inventory. The Government served the notice inventory on defendant on July 10, 1973. (Judge Zampano's Memorandum of Decision on motions to suppress at 10-11, App. 31.)

C. Presentation of Wiretap Evidence to the Judge who Issued the Wiretap Order for Sealing.

Title 18 U.S.C. Sec. 2518 (8) (a) requires the Government to present wiretap evidence to the judge who issued the wiretap order "immediately" upon the expiration of the period of the order, or extensions thereof. As noted *supra*, Judge Murphy's order expired on January 30, 1973. Yet, according to the testimony of FBI Agent Connolly,

who supervised the electronic surveillance in this case, the tapes of the January 17-27, 1973 wiretaps were not sealed before the judge until July 29, 1973. (App. 33; T. at 216-18.)

### **Summary of Argument**

In this case, evidence essential to the Government's case against defendant was obtained as a result of electronic surveillance. Defendant moved to suppress such evidence prior to trial on the ground that the Government had failed to make timely service of a notice inventory on the defendant. During trial, when it became apparent for the first time that the Government had activated a pen register on defendant's telephone line contemporaneously with the wiretap of January 17-27, 1973, without having obtained prior judicial authorization for the pen register, defendant moved again for suppression of all primary and derivative electronic surveillance evidence. Judge Zampano denied defendant's suppression motions. Defendant's claim that the Government's delay in presenting the tapes to Judge Murphy for sealing requires suppression of that evidence is made for the first time on appeal.

### **Defendant's Arguments Are:**

1. The government's failure to obtain a court order on a showing of probable cause prior to installing a pen register on defendant's telephone line did not meet the constitutional requirements of the Fourth Amendment.

2. The Government's failure to serve the defendant with a notice inventory until July 10, 1973, where the electronic surveillance had been conducted during the period January 17-27, 1973, constituted a failure to satisfy a statutory requirement which directly and substantially implements the congressional intention to limit the use of

intercept procedures to those situations clearly calling for the employment of such devices.

3. The Government's failure to present the tapes to the judge who issued the wiretap order "immediately" upon the expiration of that order constituted a failure to satisfy a statutory requirement which directly and substantially implements the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of such devices.



## ARGUMENT

**I. The Government's Failure To Obtain A Court Order On A Showing Of Probable Cause Prior To Installing A Pen Register On Defendant's Telephone Line Requires Suppression Of All The Government's Electronic Surveillance Evidence.**

As noted in the Statement of Facts, Sec. II A, *supra*, the Government activated a pen register on defendant's telephone line during the period of the January 17-27, 1973 wiretaps without having made any application or obtained approval therefor from a judicial authority. That the evidence obtained as a result of this pen register was vital to the Government's case is clearly demonstrated by the following exchange:

\* \* \* \*

THE COURT: Let me get the facts straight. Mr. Connolly, do any of the logs that the government is trying to get into evidence—and I believe they are known as 39, 40 and 41 for Identification—refer to any information taken by a pen register or a dial recorder from January 17 to January 27?

\* \* \* \*

THE WITNESS: Yes, they do.

THE COURT: Which exhibits?

THE WITNESS: I believe they all do, your Honor.

(App. 45; T. at 323.)

\* \* \* \*

Nevertheless, Judge Zampano denied defendant's motion to suppress on the Grounds that (1) it was untimely, and (2) reasoning that, since a wiretap order had been

issued pursuant to Title III, authority for the pen register, being a "lesser intrusion", could be found within the ambit of Judge Murphy's wiretap order. (See App. 43; T. at 322-330.)

With respect to the timeliness of defendant's motion, it can only be reiterated that at no point in the extensive pretrial discovery did the Government make any mention of the January pen register on defendant's telephone line. (However, discovery materials provided by the Government did clearly demonstrate an application and order for additional pen registers in May 1973. App. 23, 25.) This matter first came to the attention of defendant's counsel upon voir dire of Agent Connolly, (App. 33; T. at 316-19; 322; 336-38.) And defendant's motion to suppress immediately followed this disclosure.

Concerning Judge Zampano's ruling on the legal merits of defendant's motion, in which he relied largely on the authority of *United States v. Falcone*, 505 F. 2d 478 (3rd Cir 1974), cert. denied 420 U.S. 955 (1975) (App. 56; T. at 335-36.), the law is now clear that his ruling that, because of the existence of this wiretap order, no separate court order was required for the January pen register on defendant's telephone line was erroneous. As Mr. Justice Powell wrote in *United States v. Giordano*, 416 U.S. 505, 533 (1974):

Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment

(concurring in part and dissenting in part, joined by Burger, C. J., Blackmun & Rehnquist, J. J.)

And this Court, in *Application of U.S. In Matter Of Order*,

*Etc.*, 538 F. 2d 956 (2d Cir. 1976), interpreting the above cited statement as meaning that a pen register order involves a search and seizure under the Fourth Amendment, held squarely that "a pen register order may only be issued after a showing of probable cause." *Id.* at 959.

Here, since the Government made no such showing and obtained no order prior to installing the pen register, its use on the defendant's telephone line during the period January 17-27, 1973 was in clear violation of his rights under the Fourth Amendment. And, since such information provided by this pen register figured in all the Government's electronic surveillance evidence (App. 45; T. at 323.), all such evidence, primary and derivative, must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963).

## II. The Government's Failure To Serve Defendant With A Timely Notice Inventory Requires Suppression Of The Government's Wiretap Evidence.

Judge Murphy's wiretap order, by its terms, expired on January 30, 1973. Under 18 U.S.C. Sec. 2518 (8) (d), the Government was required to serve a notice inventory on defendant within a reasonable time, not to exceed ninety days beyond the termination of the wiretap order or extensions thereof. This latter date was April 30, 1973. Defendant was not served with the notice inventory until July 10, 1973—some 71 days beyond the statutory deadline.

In the course of defendant's pretrial motion to suppress on this ground, the Government claimed, and Judge Zampano ruled, that the Government had obtained an "extension" of Judge Murphy's order. But the so-called "extension" was not granted until April 25—three months after Judge Murphy's order had expired. (Judge Zampano's Memorandum Of Decision, at 10-11; App. 31.) Three days

prior to the termination of Judge Newman's thirty day "extension," Judge Murphy ordered a further "extension" and set July 16, 1973 as the final date for service of inventories.

In the first instance, it is clear that the orders entered by Judge Newman on April 25 and by Judge Murphy on May 22 were *not* extensions of Judge Murphy's original order. That order had expired, by its terms, by January 30, 1973. The Government's claim that it could seek such an "extension"—some 84 days after the expiration of the order—is not tenable. See *United States v. Gigante*, 538 F. 2d 502, 507-08 (2d Cir. 1976), where this Court remanded to the District Court for a determination of whether a 13 day delay between the expiration of an order and the issuing judge's action on a related order constituted such an "extension".

Section 2518 (8) (d) does permit "postponement" of service of the inventory on an ex parte showing of good cause. However, defendant maintains that considering the congressional intent to strictly delimit and minimize wiretapping, and Sec. 2518 (8) (d)'s clear injunction that service of inventories must be made within a reasonable time and not later than ninety days after the expiration of the wiretap order, or extensions, as well as the language of the "postponement" provision, only one such "postponement" is permissible. Construing Judge Newman's order of April 25, 1973 as the "postponement" order, service of the inventory on defendant was required at the latest by May 25, 1973.

Defendant maintains that the notice inventory requirement is one of those "statutory requirements that directly and substantially implements the congressional intent to limit" Title III surveillance. *United States v. Giordano*, *supra*, at 527, and that failure to comply strictly by the Government requires suppression. At any rate, service of



the inventory on defendant on July 10, 1973 was prejudicial. On May 22, 1973, Judge Murphy signed a 15 day order authorizing the use of pen register on telephone lines of two other persons, one of whom was subsequently indicted as a co-defendant. Had the inventory been served by the latest permissible date, May 25, defendant could have acted to protect himself against the further evidence provided by the May pen registers. Cf. *United States v. Principie*, 531 F. 2d 1132 (2d Cir. 1976); *United States v. Rizzo*, 492 F. 2d 443 (2d Cir. 1974). But see *United States v. Donovan*, 513 F. 2d 337 (6th Cir. 1975) cert. granted 96 S. Ct. 1100 argued 20 CrL 4043 (1976). *United States v. Bernstein*, 509 F. 2d 996 (4th Cir. 1975) cert. granted 19 CrL 4126 (1976). The Government's delay in service of the inventory on defendant was unreasonable. Accordingly, the Government's wiretap evidence against defendant obtained under Judge Murphy's order, and all evidence derived therefrom, must be suppressed. *Nardon v. United States*, 308, U.S. 338 (1939).

### III. The Government's Failure To Present The Wiretap Tapes To The Judge Who Issued The Order Immediately Upon The Expiration Of The Order Requires Suppression Of All Electronic Surveillance Evidence.

This issue is raised on appeal for the first time in light of this Court's recent ruling in *United States v. Gigante*, 538 F. 2d 502 (2d Cir. 1976).

As discussed in the preceding section, Judge Murphy's wiretap order expired on January 30, 1973, and there was no valid extension of that order. In accordance with Sec. 2518 (8) (a), the Government was required to make the tape recordings of intercepts of defendant's telephone conversations available to Judge Murphy "immediately" upon the expiration of his order. However, from testimony given

at trial by the FBI Agent who supervised this wiretap operation, it appears that the tapes were not actually sealed until July 29, 1973--some six (6) months after Judge Murphy's order had expired:

\* \* \* \*

Q. Over what period of time were there interceptions?

A. January 17 to January 27, 1973.

\* \* \* \*

Q. Do you recall the date that these tapes, that that box was sealed?

A. I believe it was sealed on July 29, 1973.

(App 33; T. at 216, 218.)

In *Gigante, supra*, this Court held that failure by the Government to punctiliously observe the requirement of 18 U.S.C. Sec. 2518 (8) (a) that wiretap evidence be presented to the judge "immediately" upon expiration of his authorizing order requires suppression. And there is no requirement for an appellant in such case to make a showing that such tapes have been tampered with. (538 F. 2d at 505.) Here, the record reveals an unexplained failure by the Government to present the tapes to Judge Murphy until six (6) months after his order had expired. In accordance with *Gigante, supra*, such tapes must be suppressed.

#### IV. SUMMARY

In this case, primary and derivative evidence secured by electronic eavesdropping and a pen register was essential to prove the Government's case against the defendant. However, as to the wiretap evidence, the Government flouted the stringent statutory safeguards of Title III both by fail-

ing to serve a timely notice inventory on defendant, to his prejudice, and by failing to present the tapes of intercepted telephone conversations to the authorizing judge immediately upon the expiration of the wiretap order.

As to the pen register, the Government installed it on defendant's telephone line without obtaining any court order on a showing of probable cause, thereby violating defendant's Fourth Amendment right to be free from unreasonable searches, and seizures.

#### V. CONCLUSION AND REMEDY SOUGHT

For the foregoing reasons, all primary and derivative evidence secured by wire interceptions and use of the pen register on defendant's telephone line should be suppressed, and the judgment appealed from should be reversed.

Respectfully submitted,

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